

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. H09 84

OBED M. LASSEN, COMMISSIONER, STATE LAND
DEPARTMENT, PETITIONER,

vs.

ARIZONA, EX REL. ARIZONA
HIGHWAY DEPARTMENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED MARCH 11, 1966
CERTIORARI GRANTED MAY 2, 1966

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1109

OBED M. LASSEN, COMMISSIONER, STATE LAND
DEPARTMENT, PETITIONER,

vs.

ARIZONA, EX REL. ARIZONA
HIGHWAY DEPARTMENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

INDEX

Original Print

Record from the Supreme Court of the State of
Arizona

Petition for writ of prohibition	1	1
Memorandum of points and authorities in sup- port	4	3
Exhibit "A"—Article VIII, Subchapter B, Chapter 11—Rules and Regulations Govern- ing Rights of Way, November, 1964	7	5
Notice of proposed adoption of the rules	14	14
Notice of hearing on petition for writ of prohibi- tion	15	16
Order setting time for hearing petition for writ of prohibition	16	16
Response to petition for writ of prohibition	17	17
Memorandum of points and authority in sup- port	20	18

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 7, 1966

	Original	Print
Record from the Supreme Court of the State of Arizona—Continued		
Order granting alternative writ of prohibition and directing issuance thereon _____	26	24
Alternative writ of prohibition _____	27	25
Petitioner's opening memorandum in support of the alternative writ of prohibition being made permanent _____	40	26
Stipulation and order extending time to file reply memorandum _____	45	31
Waiver of further memorandum _____	54	32
Opinion, McFarland, J. _____	61	33
Motion for rehearing _____	71	43
Objections to motion for rehearing _____	78	49
Memorandum in opposition to motion for rehearing _____	80	51
Motion of Arizona Education Association for leave to be heard amicus and for reconsideration _____	83	53
Order denying motion for rehearing and motion for leave to file amicus curiae brief _____	88	56
Order allowing certiorari _____	89	57

[fol. 1]

**IN THE SUPREME COURT OF THE STATE
OF ARIZONA**

No. 8620

**STATE OF ARIZONA, ex rel. ARIZONA
HIGHWAY DEPARTMENT, Petitioner,**

vs.

**OBED M. LASSEN, Commissioner, STATE
LAND DEPARTMENT, Respondent.**

PETITION FOR WRIT OF PROHIBITION—Filed Dec. 14, 1964

Petitioner, by and through its attorney, Robert W. Pickrell, The Attorney General, respectfully petitions this Court for a Writ of Prohibition staying further promulgation and/or enforcement by the respondent of Rules and Regulations Governing Rights of Way, November, 1964, a true copy of which is attached hereto as Exhibit "A", insofar as they purport to require the Petitioner to pay compensation for Rights of Way and Material Sites (see Rule 12 therein), and in support thereof states as follows:

I

The real parties in interest herein are the petitioner and the respondent.

II

This petition is brought before this court under its original jurisdiction as set forth in Art. 6, § 5, Constitution of Arizona, (as amended, November 8, 1960), and is brought initially in this court rather than in an inferior tribunal due to the nature of the controversy, the parties being two

[File endorsement omitted]

agencies of the state, and the need for an immediate clarification of a point of law, the certainty of which is essential to the continued operations of both the petitioner and respondent herein.

[fol. 2]

III

On November 19, 1964, the respondent filed in the Office of the Secretary of the State of Arizona, a notice of adoption of rules, pursuant to A. R. S. § 41-1002.

IV

Pursuant to said notice, your petitioner presented arguments, both orally and in writing at the hearing set by the respondent on December 14, 1964, at 10:00 o'clock A.M., advising him that under the law of this state he has no jurisdiction to do what he is attempting to do.

V

The respondent rejected petitioner's petition and ordered that the rules be finally adopted and enforced as written.

VI

While the Administrative Procedure Act, A. R. S. § 41-1001 et seq., provides that the validity of a rule may be tested by a declaratory judgment in the Superior Court of Maricopa County, A. R. S. § 41-1007A, it also specifically does not preclude other remedies for testing the validity of rules so promulgated (A. R. S. § 41-1007B). For the reasons and authority set forth more fully in the memorandum in support of this petition and attached hereto, in this situation, an action at law for declaratory relief could not be either speedy or adequate.

VII

The relief sought by the petitioner is clearly within the jurisdiction of this court as appears in more detail in the memorandum of authorities attached hereto. Two decisions

of this court, which have not been overruled or modified by this court, or abridged by the legislature, clearly and unmistakably deny to the respondent the jurisdiction to require the State of Arizona, by and through its Highway [fol. 3] Department, to pay compensation to respondent for rights of way and material sites in and to land under his control and jurisdiction.

Wherefore, petitioner prays that this court issue an Alternative Writ of Prohibition to Stay all further promulgation or enforcement, either directly or indirectly, of the rules in question pending final determination of the jurisdictional question by this court, and that by such Alternative Writ, respondent be ordered to show cause why the Alternative Writ should not be made peremptory.

Dated this 14th day of December, 1964.

Respectfully submitted,

Robert W. Pickrell, The Attorney General; By:
Gary K. Nelson, Assistant Attorney General,
Attorneys for Petitioner.

Duly sworn to by Gary K. Nelson, jurat omitted in printing.

[fol. 4]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITIONER'S PETITION

This petition is brought in this court pursuant to its original jurisdiction as set forth in Art. 6, § 5, of the Arizona Constitution (as amended, November 8, 1960, Cum. Supp., 1 A. R. S.). Paragraph 1 of Art. 6, § 5, supra, grants to this court original jurisdiction as to state officers in extraordinary writ proceedings.

It appearing that this petition might have been lawfully made to a lower court in the first instance, the petitioner

4
herein has set forth in its petition the circumstances indicating that it is proper for the writ sought to issue originally from this court pursuant to the requirements of Rule 1(b)1., Rules of the Supreme Court, 17 A. R. S.

The only decision of this court discovered by your petitioner which even remotely bears on this point of circumstances is *McCarrell v. Lane*, 76 Ariz. 67, 258 P. 2d 988. In that instance, the petitioner, a private citizen, sought and obtained in this court a writ of mandamus requiring the superintendent of motor vehicles to issue to him certificates of title to two new automobiles.

It does not appear that the matter of the circumstances justifying the original application for the writ in the Supreme Court, and the issuance of the same, was raised or discussed by the court. The same rule (Rules of the Supreme Court, Rule 11, par. 1, Code '39, Supp. 52), was in effect, however, and we must assume the court's rules were complied with and the circumstances considered sufficient. If this be the case, the facts of the matter at bar, in the opinion of your petitioner, are sufficient to justify this court in exercising its original jurisdiction. Two agencies of the state are involved; millions of public dollars and tens of thousands of acres of public lands will be affected; any delay in resolving this matter may result in curtailment of construction and irreparable damage by way of unmeasurable penalties; a decision of this court may need to be revisited, clarified, modified, or overruled in light of current circumstances.

The *McCarrell* case, *supra*, also is authority for the proposition that the judicial remedy set out in A. R. S. § 41-1007A, for a declaratory judgment of validity, may in a given case be inadequate to meet the ends of justice. Paragraph B of A. R. S. § 41-1007 indicates that our legislature also recognized this fact when it specifically indicated this remedy was not exclusive. Its inadequacy in this case is clear on the facts. The closing down of construction jobs, the loss of public funds in unnecessary penalties, the delay in providing adequate and safe highways for the traveling public, and the cost of possible rerouting, which might be forthcoming if this matter is caught up in protracted litigation.

tion, indicate that your petitioner has no plain, speedy and adequate remedy at law.

Prohibition is a proper remedy for the prevention of the usurpation or exercising by an inferior tribunal or officer jurisdiction with which they have not been vested by law. *Hislop v. Rodgers*, 54 Ariz. 101, 92 P. 2d 527; *Renck v. Superior Court of Maricopa County*, 66 Ariz. 320, 187 P. 2d 656.

In the case at bar, the respondent, State Land Commissioner, has clearly acted in excess of his jurisdiction in attempting by these amended rules to require the State of Arizona, by and through its highway department to pay compensation for rights of way and material sites granted from State Trust Lands. This court, in *State v. State Land Department*, 62 Ariz. 248, 156 P. 2d 901, and in *Grossetta v. Choate*, 51 Ariz. 248, 75 P. 2d 1031, held that the state could acquire for highway purposes lands held in trust under the enabling act and that no compensation needed to be paid therefor. The holdings are clear and unequivocal. Unless this court is persuaded to revisit these cases in light of the changed circumstances of nineteen years, or unless the cases can be interpreted so as to now allow the Respondent to exact this compensation, this court has no choice but to grant to petitioner the relief it seeks.

Dated this 14th day of December, 1964.

Respectfully submitted,

Robert W. Pickrell, The Attorney General, By:
Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

[fol. 7]

EXHIBIT A TO PETITION

ARTICLE VIII, SUBCHAPTER B, CHAPTER II

RULES AND REGULATIONS

GOVERNING RIGHTS OF WAY

NOVEMBER, 1964

[fol. 8]

INDEX

ARTICLE VIII, SUBCHAPTER B, CHAPTER II

RULES AND REGULATIONS

GOVERNING RIGHTS OF WAY

NOVEMBER, 1964

- Rule 1: Rules and Regulations Covered by this Article Apply only to Rights of Way of Material Sites
- Rule 2: Definitions
- Rule 3: Land Subject to Right of Way and Term
- Rule 4: Application for Right of Way
- Rule 5: Renewal Application for a Definite Right of Way
- Rule 6: Rights of Surface and Subsurface Lessees
- Rule 7: Rental
- Rule 8: Form of Definite Right of Way and Provisions Thereof
- Rule 9: Form of Indefinite Right of Way and Provisions Thereof
- Rule 10: Granting of Indefinite Right of Way
- Rule 11: Effect of a Right of Way
- Rule 12: Rights of Way for State and County Highways and Material Sites
- Rule 13: Applications for Rights of Way for State and County Highways and Material Sites
- Rule 14: Form of Rights of Way for State and County Highways and Material Sites
- Rule 15: Application Fees Excepting State and County and Material Site Rights of Way

Rule 16: Abandonment of Non-use of Highway Rights of Way or Material Sites; Transfer by State and County; Notice Thereof

Rule 17: Use of State Lands; Failure to Use

Rule 18: Applications to Assign Rights of Way

Rule 19: Fees

[fol. 9]

RULE 1

RULES AND REGULATIONS COVERED BY THIS ARTICLE APPLY ONLY TO RIGHTS OF WAY AND MATERIAL SITES. The Rules and Regulations contained in this Article apply to Rights of Way and Material Sites only and the lands covered thereby.

RULE 2

DEFINITIONS.

A "Right of Way" is a right of use and passage over State land for such purpose as the Commissioner may deem necessary.

A "Material Site" is an area granted for the purpose of entering and removing natural materials for highway construction purposes.

"Surface Lessee" means the holder of a lease on the surface of any State land for Grazing, Agricultural, Commercial, Homesite or Natural Products.

"Subsurface Lessee" means the holder of a lease on the subsurface of any State land for commercial purposes or for Oil, Gas, Mineral or Natural Products.

"Definite Right of Way" means a Right of Way granted for a definite period of years.

"Indefinite Right of Way" means a Right of Way granted for an indefinite period of time and for as long as Right of Way is used for the purpose granted and are of the following types:

TYPE (A): LAND MUST NOT BE FENCED. ANY OVERHEAD POLE LINE MUST PROVIDE THAT POLES WILL BE AT LEAST 100' APART, WHERE FEASIBLE. SURFACE OF THE LAND MUST BE AVAILABLE FOR USE BY OTHER SURFACE LESSEES. RIGHT OF WAY WIDTH MUST NOT EXCEED 30'.

TYPE (B): ANY INDEFINITE RIGHT OF WAY THAT DOES NOT QUALIFY UNDER TYPE (A).

RULE 3

LAND SUBJECT TO RIGHT OF WAY AND TERM.

All State lands may be subject to Right of Way easement for a term of not more than ten (10) years or for such lesser term as may be established by the Commissioner. Rights of Way may be granted for an indefinite period of time, so long as said Right of Way is used for the purpose granted.

No Right of Way will be granted where damage or injury to improvements owned by a surface or subsurface leaseholder would result unless compensation for the value of damage or injury to said improvements has first been determined and a settlement made.

[fol. 10]

RULE 4

APPLICATION FOR RIGHT OF WAY. An application for a Right of Way shall be made on Application for Right of Way form provided by the State Land Department and in accordance with General Rules and Regulations relating to leasing of State lands.

The application shall be accompanied by a map showing in detail the survey of Rights of Way under application. The Commissioner reserves the right to require a survey to be made by a regularly licensed registered engineer or land surveyor at any time. The map need be of no particular scale, but should be of sufficiently large enough scale that improvements upon the surface of the land applied for may

be shown. The map is considered a part of the application for Right of Way as a line of definite location which will bind the applicant in the same manner as the Right of Way application itself to the statements made therein.

An application for Right of Way over or across State lands, the surface or subsurface of which is leased and in use, should be accompanied by a statement from such surface or subsurface lessee that he has no objections to the granting of the Right of Way, or, if such consent cannot be obtained, a statement from the applicant stating the reasons why such consent has not been obtained.

RULE 5

RENEWAL APPLICATION FOR A DEFINITE RIGHT OF WAY. Application for renewal of a definite Right of Way shall be made upon Land Department forms and in accordance with the General Rules and Regulations relating to State lands. If an applicant has not used the land for the purpose for which the initial Right of Way was granted him, he must state in detail the reasons therefor unless he has obtained from the Commissioner authorization in writing for such non-use as required by law and these Rules and Regulations.

RULE 6

RIGHTS OF SURFACE AND SUBSURFACE LESSEES. Under the law the Commissioner has the right to grant Rights of Way without the consent of the surface or subsurface lessee. In the event the Right of Way applicant and the surface or subsurface lessee are unable to arrive at the value of any improvements which may be injured or damaged by the granting of a Right of Way and the consent of the surface or subsurface lessee cannot be secured, the Commissioner may, if it is to the best interest of the State, appraise the improvements as provided by law and grant the Right of Way upon evidence of tender to the owner of improvements of the appraised value of

the same. The owner of the improvements may appeal from the appraisal of the improvements to the Board of Appeals of the Department as authorized by law and these Rules and Regulations.

In cases where to utilize the right of Way applied for it [fol. 11] is necessary to cut a fence belonging to the surface lessee or otherwise enter through a fence that is used to enclose or separate livestock, the installation of a standard cattle guard or other facilities, in accordance with such specifications as the Commissioner may prescribe, will be required by the Commissioner as a condition to the granting of the Right of Way applied for.

RULE 7

RENTAL. The annual rental for a Right of Way for not more than ten (10) years shall be at the appraised rental value.

INDEFINITE RIGHT OF WAY FOR OTHER THAN HIGHWAY PURPOSES (FOR SO LONG AS USED FOR THE PURPOSE SPECIFIED) MAY BE GRANTED WITHOUT PUBLIC AUCTION AT THE APPRAISED RENTAL VALUE AS DETERMINED BY THE STATE LAND DEPARTMENT.

DEFINITE RIGHT OF WAY FOR A PERIOD IN EXCESS OF TEN (10) YEARS WILL BE GRANTED AT PUBLIC AUCTION TO THE HIGHEST BIDDER AT NOT LESS THAN THE APPRAISED RENTAL VALUE AS DETERMINED BY THE DEPARTMENT, AT WHICH PUBLIC AUCTION THE ANNUAL RENTAL WILL BE FIXED.

RULE 8

FORM OF DEFINITE RIGHT OF WAY AND PROVISIONS THEREOF. The form of definite Right of Way offered by the Department to an applicant will be on Land

Department forms. The Right of Way will be subject to the provisions and supplemental conditions therein contained and such other conditions as may be added thereto and the provisions of law and these Rules and Regulations.

RULE 9

FORM OF INDEFINITE RIGHT OF WAY AND PROVISIONS THEREOF. An indefinite Right of Way will be prepared by the Department and will be subject to the provisions and conditions therein, and shall remain in force and effect so long as the Right of Way is used for the purposes stated therein.

RULE 10

GRANTING OF INDEFINITE RIGHT OF WAY. If the Commissioner should determine that a Right of Way for an indefinite period should be granted, he shall issue the same under terms and conditions he shall prescribe.

RULE 11

EFFECT OF A RIGHT OF WAY. A Right of Way held for a definite term neither creates nor establishes any right, title or interest in the holder thereof in and to the lands covered thereby, but shall be construed as merely a revocable license or permit.

[fol. 12] A Right of Way for an indefinite term confers upon the holder thereof a right to the use of such land for Right of Way purposes specified in his application and for as long a period as used for the purpose for which it was granted. The grant shall reserve to the State all oil, gas and mineral rights.

RULE 12

RIGHTS OF WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES. State and County highway Rights of Way and Material Sites may be granted

by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122.

RULE 13

APPLICATIONS FOR RIGHT OF WAY FOR STATE AND COUNTY HIGHWAYS AND MATERIAL SITES. Application for Right of Way and Material Sites for State and County highways shall be made upon Land Department forms.

RULE 14

FORM OF RIGHT OF WAY FOR STATE AND COUNTY HIGHWAYS AND MATERIAL SITES. The form of Right of Way offered by the Department to the State or County for highway purposes will be on Land Department forms and will be subject to the provisions and supplemental conditions therein contained and such other conditions as may be added thereto and the provisions of law and these Rules and Regulations.

The Commissioner reserves the right to limit the size, width and area of the Right of Way granted for State and County highway purposes to an area comparable to that obtained from private individuals for the same purpose.

RULE 15

APPLICATION FEES EXCEPTING STATE AND COUNTY HIGHWAY AND MATERIAL SITE RIGHTS OF WAY. No application fees will be charged the State or County applying for Right of Way for State and County highway and material site purposes.

(3) Adopt Rules and Regulations Governing Rights of

RULE 16

ABANDONMENT OF HIGHWAY RIGHTS OF WAY OR MATERIAL SITES; TRANSFER BY STATE AND COUNTY; NOTICE THEREOF. Upon abandonment of highways or material sites, the Right of Way will terminate and the land will revert to its original status. All holders thereof shall notify the Commissioner within thirty (30) days from such abandonment.

In cases of a transfer from the State to a County, or from a County to the State, for highway or material site purposes, notice of such transfer shall be given to the Commissioner in writing within ninety (90) days from such transfer.

(2) Right of Way Easement to Land RULE 17

USE OF STATE LANDS; FAILURE TO USE. No holder of a Right of Way shall use lands under easement to him except for Right of Way purposes unless authorized by the Commissioner in writing.

Applications for a special use of lands under easement to a permittee for purposes other than Rights of Way shall be made in writing in triplicate, and shall state in detail the reasons for such use. The application shall be signed and verified as provided for in applications to lease. Upon approval of the application by the Commissioner, two copies of the application with the Commissioner's approval and any limitations to such approval endorsed by the Commissioner thereon will be returned by the Commissioner to the holder of the Right of Way, one copy thereof being retained in the files of the Department.

Failure of any permittee to use the land for the purpose for which he holds an easement or permit, without having been authorized to do so by the Commissioner in writing, may, in the discretion of the Commissioner, subject said easement or permit to forfeiture or to cancellation as provided by law and these Rules and Regulations.

RULE 18

APPLICATIONS TO ASSIGN RIGHTS OF WAY. Application to assign and an application for assumption of Right of Way and transfer shall be made upon Land Department forms and in accordance with the General Rules and Regulations relating to State lands. Upon approval of the application, the assignment of the Right of Way will be made by the Commissioner upon the permit where indicated and made of record in the Department.

RULE 19**FEES.**

- | | |
|---|--------|
| (1) Application for Right of Way | \$5.00 |
| (2) Right of Way Issuance Fee | 1.50 |
| (3) Application for Transfer or Assignment of Right
of Way | 1.50 |
| (4) Assignment of Right of Way | 1.50 |

[fol. 14]

**NOTICE OF PROPOSED ADOPTION OF THE RULES OF THE
STATE LAND DEPARTMENT
(Agency, Board or Commission)**

Notice is hereby given that State Land Department,
(Agency, Board or Commission)
pursuant to the authority vested in it by Title 37, A.R.S.,
(Code section authorizing adoption of proposed regulation)

proposes to repeal and adopt regulations as follows:
(adopt, amend or repeal)

- (1) Repeal Rules and Regulations Governing Rights of
Way & Material Sites State Land Department.
(Agency, Board or Commission)

(Here quote amended section or use informative summary or attach a copy)

(3) Adopt Rules and Regulations Governing Rights of Way & Material Sites State Land Department to read:
(Agency, Board or Commission)

(Here quote new section or use informative summary or attach a copy)

See new Rules attached

Notice is given that any person interested in the proposed changes in said regulations may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the office of the State Land (Agency, Board or Commission)

Department, Room 401, State Office Building, Phoenix, Arizona, at the hour of 10:00 AM on the 14th day of December, 1964.

Dated November 19, 1964

STATE LAND DEPARTMENT
(Name of Agency)

/s/ OBED M. LASSEN
(Signature of Office)

State Land Commissioner
(Title of Officer)

(NOTE: At least twenty (20) days prior to the adoption of any rule, an original and two (2) copies of the notice of the proposed action shall be filed with the Secretary of State.)

[File endorsement omitted]

[fol. 15]
IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

NOTICE OF HEARING ON PETITION FOR WRIT OF PROHIBITION
—Filed Dec. 14, 1964

To: The Above Named Respondent: Obed M. Lassen, State Land Commissioner, you will please take notice that on the 22d day of December, 1964, at the hour of 10 o'clock A.M., Petitioner through its attorney, will present to the Supreme Court of the State of Arizona, in the courtroom in the City of Phoenix, Arizona, a petition for a writ of prohibition, a copy of which is attached hereto and if said matter cannot be heard at said time and place, said petition will be presented to the court as soon hereafter as the same can be heard.

Robert W. Pickrell, The Attorney General; By:
Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

[File endorsement omitted]

[fol. 16]
IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

ORDER SETTING TIME FOR HEARING PETITION FOR WRIT
OF PROHIBITION—Filed Dec. 14, 1964

It Is Hereby Ordered that the Petition for Writ of Prohibition filed herein be heard in the courtroom of the Supreme Court of Arizona on the 22d day of December, 1964, at the hour of 10 o'clock A. M.

Jesse A. Udall, Chief Justice.

[File endorsement omitted]

[fol. 17] **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

[Title omitted]

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

—Filed Dec. 18, 1964

In response to the Petition for Writ of Prohibition heretofore filed in this matter, the Respondent, OBED M. LASSEN, Commissioner, State Land Department, by and through ROBERT W. PICKRELL, the Attorney General, and DALE R. SHUMWAY, Special Assistant Attorney General, alleges as follows:

I

Admits the facts as set forth in Petitioner's petition and states there are no questions of fact to be determined in this matter.

II

In addition to the facts set forth in the petition, Respondent submits the following facts which are undisputed by the Petitioner:

1. That the lands under the jurisdiction of the State Land Commissioner were granted by the United States to the State of Arizona "in trust" by an Act of Congress;
2. That the Act of Congress specified subdivisions of the State of Arizona which would be the beneficiaries of the trust lands;
3. That for all the years since Arizona received these trust lands the Petitioner and other governmental bodies have applied for and received rights-of-way and material [fol. 18] sites without compensating the trust therefor;

[File endorsement omitted]

4. That the Enabling Act, the Constitution of Arizona, and the Statutes set up restrictions as to the administration and/or disposal of the trust lands.

III

The remedy sought by the Petitioner is inappropriate for either of two reasons:

1. The decisions of this court do not prohibit the requirements set forth in the new rules promulgated by the Respondent, and

2. If, as contended by the Petitioner, two decisions of this court clearly and unmistakably deny to the Respondent the jurisdiction to require compensation for material sites and rights-of-way taken from lands under his jurisdiction, then this court should reexamine these cases in the light of the present requirements for these trust lands.

Wherefore, Respondent prays that the Alternative Writ of Prohibition be denied and this court allow Respondent to carry out his duties as trustee as indicated by the new rules.

Respectfully submitted this 18th day of December, 1964.

Robert W. Pickrell, The Attorney General; Dale R. Shumway, Special Assistant Attorney General.

[fol. 19] *Duly Sworn to by Obed M. Lassen, jurat omitted in printing.*

[fol. 20]

MEMORANDUM OF POINTS AND AUTHORITY

On December 14, 1964 the State Land Department adopted Rules and Regulations Governing Rights-of-Way. These rules and regulations were an amendment to rules previously in force. Rule 12 of these rules states:

"RIGHTS-OF-WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES. State and County Highway rights-of-way and material sites may be granted by the Depart-

ment for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in ARS-12-1122."

It is the position of the Respondent that this rule is necessary to carry out the duties imposed upon him by the Enabling Act, by the Constitution, and by the Statutes governing State trust lands. The Petition for Writ of Prohibition filed by the Arizona Highway Department seeks to prohibit enforcement of this rule.

There is a mistaken notion in the minds of a great majority of both citizens and the government officials of the State of Arizona as to the nature of the lands administered by the Respondent. So that this court may be aware of the nature of these lands, it is necessary to refer to the Enabling Act in Vol. 1, *Arizona Revised Statutes*, p. 79. Section 24 of this Act grants Sections 2, 16, 32 and 36 of each Township to the State "in trust" for the support of the common schools. Section 25 sets out certain grants of a specified acreage "in trust" for each of several purposes, including university, legislative, executive and judicial public buildings, penitentiary, insane asylum, etc. Section 28 of this Act provides for the administration and disposal of the above lands. It states:

"... all lands hereby granted, including those which, having been heretofore granted... shall be by the said State held in trust, to be disposed of... only in manner [fol. 21] as herein provided..., and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, ... in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

"... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction ... notice of which public auction shall first have been duly given by advertisement, ... nor shall any sale or contract for the sale of ... natural products of such lands be made save ... after the notice by publication provided for sales and leases of lands themselves.

"Every sale, lease, conveyance, or contract of ... any of the lands ... or the use thereof or the natural products ... not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the State to the contrary notwithstanding ... "

The State of Arizona accepted the lands conveyed by the above sections of the Enabling Act and agreed to hold them "in trust" for the purposes specified by the United States Congress. See Art. 10, Sec. 1, *Constitution of Arizona*.

The State of Arizona further agreed to hold the land and/or dispose of the lands or products from the lands in accordance with the restrictions set forth in the Enabling Act. See Art. 10, Sections 2 through 11, *Constitution of Arizona*.

Since the time that these lands were granted in trust to the State of Arizona, rights-of-way and material sites have been granted to the Arizona Highway Department and Counties of the State without advertising, public auction, and without requiring that compensation be paid for the same. This practice has not gone uncontested by previous Land Commissioners.

In 1938 the Pima County Board of Supervisors sought to create a highway over and across certain State lands held in trust. The lower court held that the establishment of such highway was null and void. Our Supreme Court in *Grosetta v. Choate*, 51 Ariz. 248; 75 P 2d 1031, reversed the lower [fol. 22] court, stating,

"We think the restrictions in the grant of such lands, as to their disposition or use by the State were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions."

This decision was affirmed by our court in *State of Arizona v. State Land Department*, 62 Ariz 248; 156 P 2d 901. This case was brought seeking declaratory judgment as to the effectiveness of the Land Commissioner's order that all easements and permits theretofore issued to the State Highway Department would be surrendered and that such permits for easements or material sites would be reissued as leases. The Commissioner further ordered that payment would be made for both easements and material sites. The court holding against the order of the State Land Commissioner upheld the language in the *Grosetta* case.

These Arizona decisions relied heavily for their reasoning upon *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433; 222 P 3, 5. This case was decided many years ago by the Wyoming court under a set of facts which was considerably different from the facts now existent in Arizona. At the time of that case, highway systems were opening up a vast frontier and it was conceivable that such opening up of the frontier by roadways cast a great benefit on the trust lands of the State of Wyoming. Language from *Ross v. Trustees of the University of Wyoming*, supra was quoted in both *Grosetta v. Choate*, supra and *State of Arizona v. State Land Department*, supra. In the latter case this court stated, quoting from the *Ross* case,

"... unless such object or purpose is found to have become substantially impaired through granting a right-of-way for a county or public road, neither the Act of the State making the grant nor the Statute authorizing it should be held a violation of the trust [fol. 23] upon which the land is held or of the constitu-

tional restrictions upon its disposal." (Emphasis supplied)

This language adopted by this court clearly implies that compensation will not be required unless the object or purpose of the trust is substantially impaired.

Highway construction in a growing state like ours has become a large and expanding operation requiring large tracts of land for rights-of-way and material site purposes. Many of the rights-of-way and all of the material sites heretofore granted have no beneficial effect on the trust lands. In many cases the Petitioner, in his application for a right-of-way, requires that his right-of-way be exclusive for the construction of a "controlled access" highway. In some cases, trust lands are then completely surrounded either by the right-of-way taken or by private lands. Certainly, such a grant substantially impairs the object or purpose of the trust.

In cases where land is obtained for material site purposes, such land is often excavated to a depth of from ten to forty feet, leaving only the subsoil, an area which suffers continuing erosion. In any event, that area of the trust land is rendered practically useless for the purpose of the trust.

It is the Respondent's position that these uses of the trust lands of the State of Arizona substantially impair the purpose for which these lands were granted to the State of Arizona and that, consistent with this court's holding in *State of Arizona v. State Land Department*, supra the new rules promulgated by the State Land Commissioner are valid and enforceable by this court.

If this court should find that its ruling in *State of Arizona v. State Land Department*, supra prohibits enforcement of the rules adopted by the State Land Commissioner, then we submit that that case should be reexamined.

[fol. 24] The New Mexico Supreme Court as recently as 1956 examined the problem that is now before this court. In *State v. Walker*, 61 N.M. 374; 301 P 2d 317 the court held

that the Commissioner of Public Lands of New Mexico could charge the State Highway Commission of New Mexico for rights-of-way and material sites used in the construction of highways. It is well to note that the Enabling Act of New Mexico is identical to that of Arizona.

Section 28 of the Enabling Act and Art. 10, Sec. 2, Constitution of Arizona, provides that disposition of any trust lands or of any money or thing of value directly or indirectly derived from the lands in any manner in non-conformance with the provisions of the Enabling Act shall be deemed a breach of trust and shall be null and void. In view of these two provisions, the Respondent submits that the rule which he has adopted is necessary to carry out the intent of the Congress of the United States, that the law in Arizona does not prohibit the adoption of the rule, and that the Writ of Prohibition should not be granted.

Respectfully submitted,

Robert W. Pickrell, The Attorney General, Dale R.
Shumway, Special Assistant Attorney General.

Copy of the foregoing Response and Memorandum delivered this 18th day of December, 1964 to:

Gary K. Nelson, Assistant Attorney General, Arizona
Highway Department, 206 South 17th Avenue, Phoenix,
Arizona.

[fol. 25] Acceptance of Service (omitted in printing).

[The foregoing is omitted]

[fol. 26]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, et rel.

ARIZONA HIGHWAY DEPARTMENT, Petitioner,

VS.

OBED M. LASSEN, Commissioner,

STATE LAND DEPARTMENT, Respondent.

ORDER GRANTING ALTERNATIVE WRIT OF PROHIBITION AND
DIRECTING ISSUANCE THEREON—December 22, 1964

Upon reading and filing herein the verified petition of the State of Arizona, ex rel., the Arizona Highway Department, for a Writ of Prohibition to be issued by this court to the respondent Obed M. Lassen, the State Land Commissioner, on the ground that said respondent is in excess of his jurisdiction in the promulgation and enforcement of certain rules directly applicable to the petitioner and it appearing from said petition that the writ therein prayed for should be issued;

It Is Therefore Ordered that a writ issue out of and under the seal of this court addressed to the respondent, Obed M. Lassen, as State Land Commissioner, commanding said respondent to desist and refrain from any further promulgation or enforcement, either directly or indirectly of the rules as specified in the petition herein until the further order of this court thereon, and to show cause before this court at the Supreme Court, in the City of Phoenix, County of Maricopa, State of Arizona, on the 8th day of March, 1965, why the said respondent should not be absolutely restrained from any further action to promulgate or enforce said rules in question.

Dated this 22nd day of December, 1964.

Jesse A. Udall, Chief Justice of the Supreme Court.

[File endorsement omitted]

[fol. 27]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, ex rel.

ARIZONA HIGHWAY DEPARTMENT, Petitioner,

vs.

OBED M. LASSEN, Commissioner,

STATE LAND DEPARTMENT, Respondent.

ALTERNATIVE WRIT OF PROHIBITION—December 22, 1964

The State of Arizona to Obed M. Lassen, State Land Commissioner of Arizona, Greetings:

Whereas, it has been made to appear to this court by the verified petition of the State of Arizona, ex rel., the Arizona Highway Department, that you are exceeding your jurisdiction by proceeding to promulgate and enforce certain rules which would require the said petitioner to compensate you for state lands granted to petitioner for rights of way and material sites, and it further appearing that the law of the state strictly prohibits you from so doing:

Nevertheless, you, the said State Land Commissioner, Obed M. Lassen, as it is alleged, have proceeded to promulgate and are about to enforce said rules to the manifest injury and damage to said petitioner.

We, therefore, being willing that the laws and customs of our said state should be observed, and that our good and faithful citizens should in no wise be approved, we command you, said Land Commissioner, that you desist and refrain from any further promulgation or enforcement, either directly or indirectly, as of those certain rules specified in the petition and herein until further order of this court thereon, and that on the 8th day of March, 1965, you [fol. 28] show cause, before our court, why you should not

[File endorsement omitted]

be absolutely restrained from any further action to promulgate or enforce said rules in question. And have you then and there this writ.

Witness the Honorable Chief Justice of the Supreme Court for the State of Arizona, this 22d day of December, 1964.

Sylvia Hawkinson, Clerk.

[fol. 40]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

**PETITIONER'S OPENING MEMORANDUM IN SUPPORT OF THE
ALTERNATIVE WRIT OF PROHIBITION BEING MADE PER-
MANENT—Filed January 13, 1965**

Comes Now your petitioner, by and through its attorneys undersigned, and presents herein its opening memorandum in support of the alternative writ of prohibition heretofore issued by this court on December 22, 1964. Your petitioner incorporates by reference the memoranda of both petitioner and respondent which have heretofore been filed in this cause and will make every effort to avoid repetition.

Question Presented

The alternative writ of prohibition having been heretofore issued in this cause, the sole issue presently before the court is whether the Respondent State Land Commissioner has jurisdiction to exact compensation from the petitioner for rights of way and material sites granted to it from the "Trust" lands granted to the state by virtue of the Enabling Act. Even should this court answer this question in the affirmative, your petitioner prays that the court clearly indicate that this is the total scope of any decision in this case. Any further action indicating the court's ap-

[File endorsement omitted]

proval or disapproval of any particular method of exacting the compensation or in determining its amount would be outside the issues as presented in this cause. It is for this reason that your petitioner has not raised the propriety of using A. R. S. § 12-1122, to determine the amount of the compensation. Indeed, the petitioner has grave doubts as to [fol. 41] this particular method of valuation being totally acceptable. This problem, however, together with many others concerning the actual mechanics of collecting these monies, should this court decide the Land Commissioner does have jurisdiction, must be left to the executive and legislative branches to work out initially, subject to the normal and routine procedures of judicial review.

Argument

There can be no real question but that the law as presently constituted in this area by the decisions of the court in *Grosetta v. Choate*, 51 Ariz. 248, 75 P. 2d 1031, and *State v. State Land Department*, 62 Ariz. 248, 156 P. 2d 901, denies the respondent the jurisdiction to do what he has attempted to do. What the court must now decide is whether the decisions referred to above, and particularly as to *State v. State Land Department*, were sound at the time they were rendered, and are still proper expositions of the law as it should be today in Arizona.

Your petitioner cannot, in all candor, urge upon this court the proposition that *State v. State Land Department*, supra, should be the final and last word on this vital problem. While seemingly indicating a possible exception to its final decision (see quote set forth on page 3 of Respondent's initial memorandum of points and authorities) the court's ultimate decision is total, unequivocal, and without exception:

"The judgment of the superior court is reversed and it is hereby ordered, adjudged and decreed that the state land department and the state land commissioner are not entitled to collect, or receive and that the State of

Arizona is not required to pay, any purchase price, rental, royalty or other charge for the taking or use of school and institutional lands or the natural products thereof for the establishment, construction, maintenance or repair of state highways.

"It is further ordered, adjudged and decreed that the state land department and the state land commissioner [fol. 42] be, and he is hereby required, to issue to the state of Arizona on proper application such permits as are expedient and necessary in enabling the state and its agency, the Arizona Highway Department and the state highway engineer to carry out its function and duties with respect to the administration of state highways within the state." 62 Ariz. at 255 and 256.

The petitioner has serious doubts as to whether such an absolute position is in literal accord with the applicable provisions of the Enabling Act. The decision in *Murphy v. State*, 65 Ariz. 338, 181 P. 2d 336, analyzes in great detail Section 28 of our Enabling Act. Fully thirty-one pages of 65 Ariz. are devoted to this opinion. Rather than attempt to excise any particular portion of this lengthy, but illuminating opinion, the court is referred to it as being a more carefully considered analysis of that portion of our Enabling Act here in question. It is interesting to note, moreover, that our court in *Murphy*, supra, quotes extensively from *United States v. Ervien*, 246 F. 277, 159 C.C.A. 7, affirmed 251 U. S. 41, 40 S. Ct. 75, 64 L. Ed. 128, which is the very case heavily relied upon by the New Mexico court in both discounting *State v. State Land Department*, supra, and in holding it proper for their land commissioner to charge their highway department for rights of way and material sites granted from "Trust Lands". *State v. Walker*, 61 N. M. 374, 301 P. 2d 317.

While the reasoning of the New Mexico court in *Walker*, supra, cannot be ignored, it is interesting to note the parties to the case they basically rely on, *United States v. Ervien*, supra. The fact that the United States was the party seek-

ing relief in that case is extremely significant. In the next to the last paragraph of Section 28 of our Enabling Act, 1 A. R. S. 91, we find these words:

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United [fol. 43] States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

We need look no further than *United States v. Ervien* for an example of the Attorney General of the United States fulfilling that duty.

If it be conceded for the moment that the respondent's position is correct, i.e. that granting of free rights of way and material sites to the state and counties for highway purposes is a violation of our Enabling Act, then it must follow that the Attorney General of the United States has not fulfilled his duty in this area. Although there are presently no facts before the court concerning whether the Attorney General of the United States has been requested to take action, it must be presumed in the light of the long standing effect of this court's decision in *State v. State Land Department*, supra, and the history of this conflict in New Mexico, finally culminating in *State v. Walker*, supra, that the Justice Department was and is aware of what is being done.

This court has said on many occasions that public officials are presumed to do their duty. *Hunt v. Campbell*, 19 Ariz. 254, 169 P. 596; *Verdi Water and Power Co. v. Salt River Valley Water Users' Ass'n.*, 22 Ariz. 305, 197 P. 227, cert. denied 257 U. S. 643, 42 S. Ct. 53, 66 L. Ed. 412; *Covington v. Basich Bros. Const. Co.*, 72 Ariz. 280, 233 P. 2d 837; and many others. Are we now to depart from this long standing doctrine and presume the contrary? It would seem that the answer to this question must be no. "It must be pre-

sumed that the Attorney General's failure to act, either by request or on his own initiative, is due to the fact that this court's decision in *State v. State Land Department*, supra, is a correct and acceptable interpretation of the Enabling Act."

[fol. 44] This court's position as to compensation in *State v. State Land Department*, supra, bolstered as it is by the long continued acquiescence and inaction by the Federal Authorities specifically charged by law with the responsibility for enforcement of the Enabling Act, is certainly no more a departure from the letter and spirit of the Enabling Act than the proposition that the advertising and public auction provisions of Section 28 of the Enabling Act are inapplicable to these grants to the state for rights of way and material sites. This latter proposition was answered by our court in *Grosetta v. Choate*, supra, reaffirmed in *State v. State Land Department*, supra, and completely accepted by the New Mexico court, almost as an afterthought, in *State v. Walker*, supra, 301 P. 2d at p. 322.

For the reasons heretofore stated, the alternative writ should be made permanent.

Dated this 19th day of January, 1965.

Respectfully submitted,

Darrell F. Smith, The Attorney General, By: Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

Copy of the foregoing mailed this 19th day of January, 1965 to:

Dale R. Shumway, Attorney for Respondent, State Land Department, 400 State Office Building, Phoenix, Arizona 85007.

Rex. E. Lee, Jennings, Strouss, Salmon & Trask, Attorneys for Salt River Project as Amicus Curiae, 6th Floor, Title & Trust Building, Phoenix, Arizona, Gary K. Nelson.

[fol. 45]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME TO FILE
REPLY MEMORANDUM—February 19, 1965

It Is Hereby Stipulated by and between the counsel for the respective parties that the respondent may have until March 15, 1965 in which to submit their reply memorandum in opposition to the Alternative Writ of Prohibition being made permanent.

Dated: February 19, 1965

Dale R. Shumway, Special Assistant Attorney General.

Dale R. Shumway, Attorney for Respondent.

Gary K. Nelson, Assistant Attorney General.

Gary K. Nelson, Attorney for Petitioner.

[fol. 46]

Order

Pursuant to the foregoing stipulation, It Is Ordered that the respondent may have until March 15, 1965 in which to submit reply memorandum in opposition to the Alternative Writ of Prohibition being made permanent.

Dated: February 19, 1965.

Lorna E. Lockwood, Chief Justice.

[File endorsement omitted]

[fol. 54]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

WAIVER OF FURTHER REPLY MEMORANDUM—

Filed April 1, 1965

Comes Now the Petitioner, by and through its attorneys undersigned, and hereby waive the filing of any further memorandum as provided for by the order of this Court. All matters necessary for the determination of this cause have been exhaustively presented by the briefs and arguments heretofore presented and filed in this case.

Respectfully submitted,

Darrell F. Smith, The Attorney General, By: Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner, 159 Capitol Building, Phoenix, Arizona.

Copy of the foregoing mailed this 1st day of April, 1965 to:

Dale B. Shumway, Special Assistant Attorney General, Attorney for Respondent, 400 State Office Building, Phoenix, Arizona 85041.

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts, Nos. 3 and 4, Pinal County, Suite 733, Security Building, Phoenix, Arizona.

[fol. 55] A. Van Wagenen, Jr., Attorney for Electrical Districts, Nos. 2 and 5, Pinal County, 85 North Country Club Drive, Phoenix, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Westover, Copple Keddie & Choules, Attorneys for Welton Mohawk, Irrigation & Drainage, District of Yuma, Yuma, Arizona.

[File endorsement omitted]

**Richard J. Riley, County Attorney, Cochise County,
Bisbee, Arizona.**

**Jennings, Strouss, Salmon & Trask, J. A. Riggins, Jr.,
Rex E. Lee, Attorneys for Salt River Project, Improvement
and Agricultural District, 6th Floor, Title & Trust Building,
Phoenix, Arizona.**

**By: Gary K. Nelson, Assistant Attorney General, 159
Capitol Building, Phoenix, Arizona.**

[fol. 61]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

No. 8620

THE STATE OF ARIZONA, ex rel.

ARIZONA HIGHWAY DEPARTMENT, Petitioner,

v.

OBED M. LASSEN, Commissioner,

STATE LAND DEPARTMENT, Respondent.

**Alternative Writ of Prohibition Heretofore
Issued Made Permanent**

**Darrell F. Smith, The Attorney General, Robert W.
Pickrell, former Attorney General, Gary K. Nelson,
Assistant Attorney General, Attorneys for Peti-
tioner.**

**Dale R. Shumway, Special Assistant Attorney General,
Attorney for Respondent.**

**Rex E. Lee, Jennings, Strouss, Salmon & Trask, At-
torneys for Salt River Project Agri. Improvement
District;**

[File endorsement omitted]

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts Nos. 3 & 4, Pinal County;

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 & 5, Pinal County;

E. Leigh Larson, County Attorney, Santa Cruz County;

Westover, Copple, Keddie & Choules, Attorneys for Welton Mohawk Irrigation & Drainage District;

Richard J. Riley, County Attorney for Cochise County, Attorneys for Amici Curiae.

OPINION—Filed November 12, 1965

McFarland, Justice:

For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579.

[fol. 62] On December 14, 1964, the State Land Commissioner, hereinafter designated as Land Commissioner or respondent, after giving notice of a proposal to change the rules and regulations governing the rights of way and material sites over these lands, and holding a hearing at which petitioner appeared and filed an objection thereto, adopted the following rule designated as Rule No. 12 of the State Land Department, to-wit:

"State and County highway Rights-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in ARS 12-1122."

Objections were overruled. On the same day, the State Highway Department, hereinafter designated as the Department or petitioner, filed this writ of prohibition to prevent respondent from enforcing this rule. An alternative writ of prohibition was granted by this court.

The question presented in this case is whether the Land Commissioner has the authority to adopt the rule as set forth which, in effect, provides for the payment for rights of way and material sites over these trust lands by the petitioner.

The lands were granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910. Under Sec. 24 of this act, the State was granted "in trust," certain sections of every township for the support of common schools, with the opportunity to make indemnity selections where any of the sections were lost for one or more reasons. Congress further provided, in Sec. 25 of the Enabling Act, twelve specific grants for the following purposes: university; legislative, executive and judicial, public buildings; penitentiaries; insane asylum; school and asylum for deaf, dumb and blind; miners' hospital; normal schools; state charitable, penal and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutions; and county bonds. By Sec. 1, Art. 10, of the Constitution of Arizona, the people of Arizona accepted the terms of the Enabling Act.

"§ 1. Acceptance and holding of lands by state in trust

"Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified

in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Respondent claims it has this authority under Section 28 of the Enabling Act, which sets forth the rules for the administration and disposition of the "trust lands" confirmed to the State of Arizona under Sec. 24 and Sec. 25. Section 28 provides, in part:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in [fol. 64] any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

"... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction...

"... nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves...

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed . . .

• • • • •

" . . . It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

It is the contention of the respondent that, under the terms of these rules, it is a breach of trust to allow the petitioner to use the "trust lands" without compensating the trust fund for the use thereof.

This question has been before this court on two prior occasions—the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031, and the case of *State v. State Land Department*, 62 Ariz. 248, 156 P.2d 901. In *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, the late Justice LaPrade set forth an able and scholarly history of the Enabling Act. We see no reason for trying to add to the history of this act. In [fol. 65] the case of *State v. State Land Department*, *supra*, we said:

"The holding of this court in the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 Pac. (2d) 1031, substantially determines all the issues herein involved. In that case, we reviewed an order of the trial court holding that the establishment of a county highway over school land was void because the land was held in trust under the Enabling Act, and that the granting of a right-of-way

thereover to a county was a violation of the Act. The judgment of the lower court was reversed, the holding being that the land department could grant a right-of-way for public highways over school land to the several counties since the Enabling Act does not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways.

"This decision was predicated on an interpretation of Section 11-601, Arizona Code Annotated 1939. This section of the code, together with the provisions contained in Sections 11-1001, 11-1002 and 11-1003, were all enacted at the same time. See Laws of 1915 (2nd S.S.). Sections 11-1001, 11-1002 and 11-1003 were in effect at the time of the opinion and judgment in the case of *Grossetta v. Choate*, *Supra*. The holding in the *Grossetta v. Choate*, *supra*, case was predicated not only on the statutory provisions of Section 11-601, but also considered the restrictions of the grant in the Enabling Act.

"It is the contention of the land commissioner that this court in the *Grossetta* case did not pass on the question of whether such rights-of-way may be granted without compensation to the permanent fund to which he contends the lands are attached or belong.

"In the *Grossetta* case we cited the case of *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, and from a very lengthy opinion rendered on petition for rehearing in that case (31 Wyo. 464, 228 Pac. 642, 647), we quote with approval a portion of the opinion as applicable to the question under consideration:

"The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and main-

Th
court
New
P.2d
the E
the o
v. Sta
supra
these
Th
than
areas

taining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a [fol. 66] fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held, or of the constitutional restrictions upon its disposal. For the natural tendency of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.'

"It is true that in the Grossetta case, the court did not in terms pass on the question of whether under Section 11-1001, *supra*, easements for highways could be granted over these lands without compensation. It is evident, however, that this court in the Grossetta case had in mind the undoubted right of the state to provide for public highways, and if such highway was for a wholly public purpose, the right of the state to use such school or institutional lands for highway rights-of-way without compensation is inferred." 62 Ariz. at 253, 156 P.2d at 903

The Land Commissioner, in his brief, contends that this court should follow the decision of the Supreme Court of New Mexico in the case of *State v. Walker*, 61 N.M. 374, 301 P.2d 317, rather than our own decisions, for the reason that the Enabling Acts for each state were identical. We are of the opinion that the holdings in the case of *State of Arizona v. State Land Department*, *supra*, and *Grossetta v. Choate*, *supra*, are sound, and see no reason for departing from these decisions.

The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived

of anything of value. It is well known that good highways throughout a state increase the value of the lands. These lands are located throughout the state. The Land Commissioner, in his memorandum, sets forth what he states to be a fair value for these rights of way. He does not give the basis of the value, nor was it based upon evidence submitted in the case. Certainly, if the highways had not been established [fol. 67] the values of these lands would have been much less. Nor does he state whether the values estimated are those when the easements were first granted or as of the present time, after the values have been enhanced by the building of a highway system throughout this state.

This court, in the State Land case (Conway), supra, made two fundamental determinations:

1. It was held that as a matter of law the grant of non-rental rights of way for the purpose of constructing the kind of roads involved in that case resulted in an over-all benefit to school trust lands.

2. It was held that where there is such a benefit the State Land Department must grant the requested rights of way free of charge.

We certainly agree that, in making a determination as to whether the proposed construction would result in an over-all benefit to trust lands, such determination must be made upon all of the trust lands as a whole, rather than taking them parcel by parcel. The Land Commissioner, in his memorandum, asked the question: If highway construction by states and counties improves the lands that the highways cross, why, then, is it ever necessary for compensation to be paid to a private land owner when his land is taken? Private lands are in a different category from these trust lands. Private lands are in relatively small tracts, and the value of the right of way to the owner is frequently out of proportion to the benefit to him, while, as we have held, the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an over-all benefit to the trust lands as a whole.

The value of these large tracts of trust lands is greatly enhanced by the building of a highway system through and to the same. The two situations are not analogous.

In the Grossetta case, *supra*, we said:

[fol. 68]

"... We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions. In *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, 5, the court said:

"The questions in the case concern the right of the Legislature to give to the board of land commissioners the power which it has assumed to exercise under this statute [statute similar to our section 3005, *supra*]. We think it proper first to consider the contention that the granting of the right of way is prohibited by several provisions of the acts of Congress granting the lands to the state and of the state Constitution. [Here the court sets out the provisions of the Enabling Act with reference to the grant of land to the state of Wyoming and the terms of the acceptance of such grant, which are very much like ours.] However, we cannot for a moment believe that it was intended that the restriction on the use of the lands should interfere with the establishing of public roads across them.

"The power of a state to provide highways for public use has been likened to the power of taxation and said to be well-nigh as essential to the existence of government. Courts do not hold that the power has been surrendered except in those cases where there appears the deliberate purpose of the state to abandon it. *Cincinnati v. Louisville & N.R. Co.*, 223 U.S.

390, 405, 32 S. Ct. 267, 56 L.Ed. 481, quoting the following forceful language of Mr. Chief Justice TANEY in the *Charles River Bridge* [v. *Warren Bridge*] Case, 11 Pet. 420, 547 (9 L.Ed. 773):

““But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never [fol. 69] to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished.” . . .” 51 Ariz. at 251, 75 P.2d at 1032

The Land Commissioner contends that the material sites damage the land upon which they are located. Our statutes at the time under which the *State v. State Land*, supra, decision was made was substantially the same as at the present time. In that case we held:

“We do not find anywhere in the statutes that the legislature has in terms required the state to pay a rental or royalty on the sand, rock, gravel, or natural products from these lands used in the construction of highways. Nor is there any duty imposed upon the land commissioner by the law to collect such rentals or royalties.” 62 Ariz. at 255, 156 P.2d at 904

There was no evidence presented in the case in regard to these material sites. It is plain that both the granting of the rights of way and the material sites enable the building of highways, and are of material benefit to the trust lands as a whole, and enhance the value thereof.

For the reasons as set forth, we hold that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona. We, therefore, order that the writ of prohibition be made permanent.

Ernest W. McFarland, Justice, Charles C. Bernstein, Justice, Howard F. Thompson, Judge.

Concurring:

Lorna E. Lockwood, Chief Justice, Fred C. Struckmeyer, Jr., Vice Chief Justice.

(Justice Jesse A. Udall having disqualified himself, Judge Howard F. Thompson sat in his stead.)

[fol. 71]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

MOTION FOR REHEARING—Filed November 29, 1965

Obed M. Lassen, Commissioner, State Land Department respectfully moves this Court under Rule 9, of the Rules of the Supreme Court for rehearing of the Court's decision of November 12, 1965 upon the following grounds:

I

The decision of the Court is in direct conflict with the clear statements of the Enabling Act of Arizona (36 Stat. 557, 568-579, Ch. 310) as interpreted by the United States Supreme Court in *Ervien v. United States*, 251 U.S. 41.

II

The Court erred in holding: (1) that the granting of rights of way and material sites to the State Highway De-

[File endorsement omitted]

partment without compensating the trust funds is of material benefit to the trust lands as a whole and enhances the value thereof; (2) that it is the duty of the State Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the grant of said lands by the [fol. 72] United States pursuant to the Enabling Act; and (3) that the granting of material sites and rights of way does not amount to a disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value.

III

The decision of the Court is in error in its reference to the case of *Grossetta v. Choate*, 51 Ariz. 248 at page 4 of the decision in that the late Justice La Prade did not write the decision, nor did the decision deal with the subject matter ascribed to it by the Court's decision in this case.

Argument

The sole question presented to this Court in the original petition and this motion for rehearing is whether the conditions and restrictions imposed upon the State of Arizona by the United States in the Enabling Act are binding upon the state in its management and disposal of the "trust lands". This exact question has been considered by the United States Supreme Court. The ruling of that Court in interpreting identical language from the New Mexico Enabling Act was directly opposite to the announced decision of this Court.

In *Ervien v. United States*, supra, in an appeal from *United States v. Ervien*, 246 Fed. 277, was presented the question that is now before this Court. The Legislature of New Mexico, soon after receiving their Enabling Act lands, enacted legislation which would authorize the Land [fol. 73] Commissioner to expend three percent of the annual income of his office "for making known the resources

and advantages of this State generally and particularly to homeseekers and investors". In an action brought to prevent this expenditure, arguments were presented which were identical to the arguments of the amici curiae in this case. Likewise, these arguments were very similar to the reasoning of this Court in its announced decision. At page 42 of the United States Report, the summation of the proponents argument states:

"... This would not constitute a breach of the trust, but only a legitimate expense in the administration of the trust estate, resulting in an increased demand for the lands, *which would increase rather than diminish the proceeds to be distributed to the beneficiaries.*

"The act looks to the *production of funds for the particular objects stated, but it has in mind also the aggrandizement and enrichment of the new State*, whose people are the real beneficiaries; and this enrichment and aggrandizement must come through home-seekers, settlers and investors. To attract these was the particular purpose of the state statute. The general advertisement of the State was purely incidental; and both sorts of publicity tended to the same end—more competition for the lands." (Emphasis added)

In the *Ervien* case, as in the case now before this Court, in opposition to the proposed diversion of trust funds, it was argued that the Enabling Act expressly prohibited using the lands or revenue from the lands for any purpose other than that specified by Congress.

Mr. Justice McKenna, writing for the Court and affirming the Court of Appeals stated:

"The case is not in broad range and does not demand much discussion. *There is in the Enabling Act a specific enumeration of the purposes for which the lands [fol. 74] were granted and the enumeration is neces-*

sarily exclusive of any other purpose. And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the land producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should be deemed a breach of trust.'

"The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, . . .

"The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. . . ." (Emphasis supplied)

The language of the United States Supreme Court is clear—THE UNITED STATES AS GRANTOR OF THE ENABLING ACT "TRUST LANDS" HAD THE POWER TO IMPOSE CONDITIONS UPON THE USE OF SUCH LANDS AND WHEN IMPOSED BY EXPRESS STATUTORY LANGUAGE, HAS THE RIGHT TO EXACT STRICT PERFORMANCE OF THE CONDITIONS. The Arizona Supreme Court in considering the same conditions as were considered by the United States Supreme Court cannot ignore the holding of that court.

Perhaps this court may feel that the problem in Arizona is distinguishable from the problem in New Mexico in the *Ervien* case. The only difference in the two problems is that in New Mexico the attempt was to use revenue produced from "trust lands" for a purpose not specified in the provisions of the grant and in Arizona the attempt is to use part of the "trust lands" for purposes not specified in the provisions of the grant. The Eighth Circuit in its decision

which was affirmed by the United States Supreme Court [fol. 75] commented on this very difference stating that the difference would not alter their holding. In *United States v. Ervien*, supra, the Circuit Court, after acknowledging that benefits would accrue from general advertising of the State, commented on other uses that might be made of "trust lands" and "trust funds". The Court said:

"The advantage accruing is too indirectly consequential to authorize the use of trust funds. *It would be but a step further to argue the advantage that would accrue to the trusts from the physical construction of some of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools and the like.*" (Emphasis supplied)

We submit that the language of both of the above decisions expressly prohibits the holding made by this Court in its decision of November 12, 1965. We respect this Court in its hesitancy to overturn its decisions in *Grossetta v. Choate*, supra and *State ex rel. Conway v. State Land Department*, 62 Ariz. 248, but in light of the above cases, which were not considered by this Court in the *Grossetta* and *Conway* cases, and in light of the facts of this case already before this Court, it seems only too clear that the holding of this Court is in direct conflict with the holding of the United States Supreme Court.

Since the filing of its brief in this case, it has come to the attention of the Respondent that of the 18 western states having "trust lands", only Arizona does not now receive compensation when its "trust lands" are used for highway construction purposes. All of the other states, either by judicial decision, as in New Mexico under the case of *State v. Walker*, 61 N.M. 248, 156 P.2d 901, or because there are no [fol. 76] state court decisions to the contrary require that the trust lands cannot be utilized by the respective highway departments unless compensation has been paid. These

states all report that this practice is accepted by their respective highway departments and by the Bureau of Public Roads, the federal agency who ultimately bears the costs to the "trust funds" by reimbursing the highway departments for 94.6 percent of their expenditures for rights of way and construction costs of the interstate highway system. This same practice of reimbursing the Arizona Highway Department for rights of way and material sites used in the construction of the interstate system is now being followed in all cases except when "trust lands" are used by the department. If on rehearing this Court should reverse its holding heretofore issued, the costs of compensating the Respondent and the respective trusts would be paid by the Bureau of Public Roads by reimbursing the Arizona Highway Department for 94.6 percent of rights of way and material site acquisition costs.

For all of the reasons set forth in this motion and for the reasons heretofore presented in Respondents Reply Brief, we urge the Court to grant a rehearing of this case and to quash the writ of prohibition.

Respectfully submitted,

Darrell F. Smith, The Attorney General.

Dale R. Shumway, Special Asst. Attorney General,
Attorneys for the Respondents, Obed M. Lassen
and State Land Department.

[fol. 77] Copy of the foregoing mailed this 29th day of November to:

Gary K. Nelson, Assistant Attorney General, Attorney for Petitioner.

Rex E. Lee, Jennings, Strous, Salmon, & Trask, Attorneys for Salt River Project Improvement District, 6th Floor, Title & Trust Bldg., Phoenix, Arizona.

Rawlings, Ellis, Burris & Kiewit, Attorneys for Electrical Districts Nos. 3 & 4, Pinal Cty., Suite 733, Security Bldg., Phoenix, Arizona.

Westover, Copple, Keddle & Choules, Attorneys for Welton Mohawk Irr. & Drainage Dist. of Yuma, Yuma, Arizona.

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 & 5, Pinal Cty., 85 North Country Club Drive, Phoenix, Arizona.

Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona, By: Dale R. Shumway.

[fol. 78]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

OBJECTIONS TO MOTION FOR REHEARING—

Filed December 7, 1965

Comes Now the Petitioner, by and through its attorney, pursuant to Rule 9(b), Rules of the Supreme Court, 17 A.R.S., and objects to the Respondent's Motion for Rehearing filed herein.

Of those matters raised in Respondent's Motion for Rehearing, only that ground enumerated as No. III, found on page 2 of said Motion, presents a matter which may be considered in this Motion. *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771. The reference of the court, on page 4 of its printed opinion in this cause, to the decision of *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031, as containing a lengthy discussion of the Enabling Act by the late Justice LaPrade, is obviously only an inadvertent error of reference, the decision intended to be cited being *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, wherein the able and scholarly history of the Enabling Act by the late Justice LaPrade is set forth in some 31 pages of Volume 65 of the Arizona Reports.

[File endorsement omitted]

With this portion of the opinion clarified the remaining arguments of Respondent in his Motion amount to mere reargument of his original position, *Climate Control, Inc.* [fol. 79] v. *Hill*, supra. The adoption of the *Murphy* history, as was no doubt the court's intention, clearly recognizes the authority of the very case Petitioner urges in his Motion, *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128, same case below, *United States v. Ervien*, 246 Fed. 277 (Extensively cited by Justice LaPrade in *Murphy*, supra, 65 Ariz., at pages 353-355), but holds, by implication, *Ervien*, supra, to be inapplicable to the situation presented in the case at bar.

The Motion for Rehearing should be denied.

Respectfully submitted,

Darrell F. Smith, The Attorney General, Gary K. Nelson, Assistant Attorney General.

Copy of the foregoing mailed this 7th day of December, 1965, to:

Dale R. Shumway, Esq., Special Assistant Attorney General, 4th Floor, Capitol Annex East, Phoenix, Arizona 85007, Attorney for the Respondent.

Attorneys for Amici Curiae:

Rex E. Lee, Esq., Jennings, Strous, Salmon & Trask, 6th Floor, Title & Trust Bldg., Phoenix, Arizona, Attorneys for Salt River Project Improvement District; Rawlings, Ellis, Burris & Kiewit, Suite 733, Security Bldg., Phoenix, Arizona, Attorneys for Electrical Districts No. 3 & 4, Pinal County; Westover, Copple, Keddie & Choules, Yuma, Arizona, Attorneys for Welton Mohawk Irr. & Drainage Dist. of Yuma; A. Van Wagenen, Jr., Esq., 85 North Country Club Drive, Phoenix, Arizona, Attorney for Electrical Districts Nos. 2 & 5, Pinal County; The Honorable Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona; The Honorable E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Gary K. Nelson.

[fol. 80]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

MEMORANDUM IN OPPOSITION TO MOTION
FOR REHEARING

The Motion for Rehearing in this case is nothing more than a restatement of the position taken by the respondent in his initial Brief. This Court has held that "by long established rule of Court" a reargument of a party's initial position is not ground for reconsideration of a decision by this Court. See *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771 (1960); *Copper Queen Mining Co. v. Arizona Prince Copper Co.*, 2 Ariz. 169, 11 Pac. 396 (1886).

At the close of its Motion for Rehearing, the respondent makes two factual assertions which are totally devoid of any authority or support in the record. This Court has held that it will not consider assertions of fact made for the first time upon Motion for Rehearing. *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771 (1960). Moreover, even if such assertions were cognizable, they are totally irrelevant.

The respondent's argument in reliance on the *Ervien* case was advanced in his initial Brief and simply reiterated here. For reasons set forth on pages 15-18 of our initial Brief, the *Ervien* case not only does not support the re-[fol. 81] spondent's position, but is authority against it. *Ervien* was a suit brought by the United States Attorney General, and the benefit in the *Ervien* case was to inure to the entire State of New Mexico, and not just to the trust lands. *Ervien* antedated both *Grossetta* and *Conway*. It is no more inconsistent with this Court's holding now than when *Grossetta* and *Conway* were decided.

[File endorsement omitted]

Stripped of irrelevancies, the position taken by the respondent in his initial brief was a simple one: two well-settled precedents of this Court should be rejected in favor of a single decision by the New Mexico Supreme Court. That is precisely the position taken by the respondent on this Motion for Rehearing. This Court has unanimously rejected this argument in the instant case and similar arguments on two prior occasions. Manifestly, there is nothing in the Motion for Rehearing which warrants reconsideration of the issue.

Respectfully submitted this 7th day of December, 1965.

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts Nos. 3 and 4, Pinal County, Suite 733, Security Building, Phoenix, Arizona.

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 and 5, Pinal County, 85 North Country Club Drive, Phoenix, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Westoyer, Copple, Keddie & Choules, Attorneys for Welton Mohawk Irrigation & Drainage, District of Yuma, Yuma, Arizona.

[fol. 82] Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona.

Jennings, Strouss, Salmon & Trask, J. A. Riggins, Jr., Rex E. Lee, By Rex E. Lee, Attorneys for Salt River Project Improvement and Agricultural District, 6th Floor, Title & Trust Building, Phoenix, Arizona 85003.

Riley, County Attorney, Cochise County, Bisbee, Arizona;
The Honorable A. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Gary K. Nelson

[fol. 83] **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

No. 8620

STATE OF ARIZONA, ex rel.

ARIZONA HIGHWAY DEPARTMENT, Petitioner,

vs.

**OBED M. LASSEN, Commissioner,
STATE LAND DEPARTMENT, Respondent.**

**MOTION FOR LEAVE TO BE HEARD AMICUS AND FOR
RECONSIDERATION—Filed December 13, 1965**

In behalf of the Arizona Education Association, we move for leave to make an amicus appearance in this matter; and we ask both that the petition for rehearing be granted and that the matter be set down for additional argument.

Respectfully submitted,

Lewis Roca Scoville Beauchamp & Tinton, By John
P. Frank, Don A. Davis, Attorneys for Arizona
Education Association.

Memorandum

This case involves substantial public school land interests. The Arizona Education Association has a primary duty to represent educational interests in Arizona. Our public lands are a heritage for school children yet unborn. By this decision, so profoundly unhappy from the educational point of view, these public lands may be crisscrossed with roads or utility lines, all without the protection we believe afforded such lands by the Arizona State Enabling [fol. 84] Act and all to the abundant benefit of everyone except the education of the future.

If this is the law, then we must of course yield. But the decision conflicts with the New Mexico decision of *State ex rel. State Highway Commission v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956). This our Court has fully recognized, and it has seen fit to reject the New Mexico point of view just as New Mexico has rejected, on this same subject matter, our point of view. But we are interpreting an Act of Congress which has been interpreted in *Ervien v. United States*, 251 U.S. 41, 40 Sup.Ct. 75 (1919). Respondents in the instant case have relied heavily on *Ervien*, both originally and in the petition for rehearing. The New Mexico Court, whose views our Court has seen fit to reject, also relies heavily on *Ervien*. Yet our Court in its opinion in the instant case has not seen fit to deal with *Ervien* at all. We respectfully submit that it warrants consideration.

We freely acknowledge that this matter has been very ably presented by Assistant Attorney General Shumway representing the Land Department's point of view. Nonetheless, there has been no one in the cause expressly representing the educational interest as such, while the counter utility interest has been very abundantly represented by the various amici. If this were purely private litigation, we would suppose that it was simply too late further to consider the matter here. But it is not private. In the circumstances, we submit that the education interest ought to be separately and independently heard, and we therefore ask that the matter be held open; that the Arizona Education Association be permitted to file a brief on the merits; and that the Court then consider whether additional argument might be proper.

Respectfully submitted,

Lewis Roca Scoville Beauchamp & Linton, By John
P. Frank, Don A. Davis.

[fol. 86] IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 8620

STATE OF ARIZONA, ex rel.
ARIZONA HIGHWAY DEPARTMENT, Petitioner,

vs.

OBED M. LASSEN, Commissioner,
STATE LAND DEPARTMENT, Respondent.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO BE
HEARD-AMICUS AND FOR RECONSIDERATION—Filed Decem-
ber 14, 1965

Had Arizona Education Association sought to file an amicus brief at an earlier stage in this matter, we would have had no objection. Coming as it does at this time, and being utterly devoid of any suggestion as to further points which have not already been presented to the Court, we submit that the Motion adds nothing and should not be allowed to further delay the final determination of the rights of interested parties.

Ervien v. United States was extensively argued in the initial briefs, and was asserted by both sides to support their respective positions. The Memorandum submitted by counsel for the Arizona Education Association can be searched in vain without the vaguest suggestion of any new argument relevant to *Ervien* or anything else which would be submitted to the Court if final decision were delayed.

It is respectfully submitted that under the relevant authorities set forth in *Climate Control, Inc. v. Hill*, 87 Ariz.

201, 349 P.2d 771 (1960), this Motion to be heard amicus, and the Petition for Rehearing should be denied.

Respectfully submitted,

Jennings, Strouss, Salmon & Trask, By Rex E. Lee,
Attorneys for Salt River Project Improvement &
Power District.

[fol. 88]

SUPREME COURT
STATE OF ARIZONA

PHOENIX

[Title omitted]

ORDER DENYING MOTION FOR REHEARING AND MOTION FOR
LEAVE TO FILE AMICUS CURIAE BRIEF—March 10, 1966

The following action was taken by the Supreme Court
of the State of Arizona on December 14, 1965, in regard to
the above-entitled cause:

"ORDER: Respondent's motion for rehearing = DENIED."

FURTHER ORDERED: Motion to file brief Amicus Curiae
= DENIED."

Sylvia Hawkinson, Clerk, By _____,
Assistant Clerk.

To:

Darrell F. Smith, Attorney General.

Attention:

Dale R. Shumway [For Obed M. Lassen & State Land
Dept.]

Gary K. Nelson, Assistant Attorney General [For Petitioner]

[File endorsement omitted]

Lewis Roca Scoville Beauchamp & Linton [For Arizona Education Assn.]

Jennings Strouss Salmon & Trask [for Salt River Project Imp. Dist.]

Westover, Copple, Keddie & Choules [For Welton Mohawk I & D Dist.]

Rawlins, Ellis, Burrus & Kiewit [For Elec. Dists. Nos. 3 & 4, Pinal]

A. Van Wagenen [For Elec. Dists. Nos. 2 & 5, Pinal County]

Richard J. Riley, County Attorney Cochise County, Bisbee, Arizona

E. Leigh Larson, County Attorney Santa Cruz County, Nogales, Arizona

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 1109, October Term, 1965

OBED M. LASSEN, Commissioner, STATE LAND DEPARTMENT,
Petitioner,

v.

ARIZONA ex rel. ARIZONA HIGHWAY DEPARTMENT.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.